

**In the Supreme Court of the United States**

OCTOBER TERM, 1976

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No. 76-434

WILLIAM FRED PHILLIPS, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 540 F. 2d 319. The opinion of the district court (Pet. App. A22-A43) is unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on June 29, 1976. A petition for rehearing was denied on July 26, 1976 (Pet. App. A43). Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including September 24, 1976, and the petition was filed on September 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTIONS PRESENTED**

1. Whether a defendant has the burden of proving that a private consensual interception of a conversation

was made for an improper purpose in violation of 18 U.S.C. 2511(2)(d) and was therefore inadmissible under 18 U.S.C. 2515.

2. Whether petitioner's grand jury testimony was perjurious in violation of 18 U.S.C. 1623.

3. Whether petitioner's false testimony was material to the grand jury's investigation.

#### STATUTES INVOLVED

18 U.S.C. 2511(2)(d) provides:

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

18 U.S.C. 2515 provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court \* \* \* of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. 2518(10)(a)(i) provides:

Any aggrieved person in any trial, hearing, or proceeding in or before any court, department,

officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted.

#### STATEMENT

After a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted of making a false statement before a grand jury, in violation of 18 U.S.C. 1623. Petitioner was sentenced to imprisonment for one year. The court of appeals vacated petitioner's conviction and remanded the case for a hearing on petitioner's pre-trial motion to suppress certain electronic interception evidence (Pet. App. A4-A10). The court rejected petitioner's remaining contentions (Pet. App. A11-A22).

The pertinent facts are set forth in the opinion of the court of appeals (Pet. App. A1-A4) and may be summarized as follows: Petitioner, an Oklahoma state senator and practicing attorney, was retained by Charles Davis, the owner of the Shangri La Lodge, a resort located in northeastern Oklahoma, to obtain approval from the Grand River Dam Authority for certain improvements to the resort's lakeshore property. On July 7, 1971, petitioner met with Davis and resort manager George Overton to discuss the legal services he would provide the Lodge and the fee he would receive. Davis tape-recorded the conversation without petitioner's knowledge. During the meeting petitioner told Davis and Overton that they could safely operate illegal gambling and liquor sales activities at Shangri La. At one point petitioner stated, "I can, I can control Frank," in apparent reference to his ability

to prevent local district attorney Frank Grayson from prosecuting the Lodge and its management for state liquor and gambling law violations.

On August 1, 1972, petitioner was called to testify before a grand jury in Kansas City, Missouri, investigating a conspiracy between Kansas City organized crime figures and northeastern Oklahoma nightclub owners to establish illicit liquor, gambling and prostitution activities at Oklahoma clubs through the corruption of local law enforcement officials, in violation, *inter alia*, of 18 U.S.C. 1511, 1951, 1952 and 1955. Petitioner repeatedly denied before the grand jury that he had ever represented to anyone that he could exert influence over any state or local law enforcement officials to protect the Shangri La Lodge and its management from prosecution for gambling, prostitution, liquor or narcotics law violations. Before calling petitioner to testify, the grand jury had heard district attorney Frank Grayson's testimony that Charles Davis had told him of petitioner's claim that he could furnish Davis protection from local law enforcement authorities.

At his trial for perjury, petitioner sought to have the tape of his conversation with Davis and Overton suppressed on the ground that the recording was made for the purpose of committing a tortious act, in violation of 18 U.S.C. 2511(2)(d). Petitioner's motion to suppress was denied without a hearing, and the tape was admitted as direct evidence of the falsity of petitioner's denials before the grand jury. The court of appeals found that petitioner had not been accorded an adequate opportunity to show that the recording was made for an improper purpose, which would require suppression under 18 U.S.C. 2511(2)(d) and 2515. The court therefore remanded the case to the district court for a hearing on that issue at which petitioner would bear the burden of showing that the conversation was recorded for one of the purposes proscribed

by 18 U.S.C. 2511(2)(d). Those proceedings have not yet been held. Petitioner raised several other contentions on appeal that were unrelated to the admissibility of the tape. Those claims were fully reviewed, and rejected, by the court of appeals.

#### ARGUMENT

1. Petitioner's main contention is that the government has the burden of showing that a consensual tape-recording *was not* made for one of the purposes proscribed by 18 U.S.C. 2511(2)(d) and accordingly that the court of appeals in its remand order erroneously placed on him the burden of showing that the tape *was* made for an improper purpose.

In view of the remand by the court of appeals, resolution of petitioner's contention at this juncture is premature. See *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327; *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251. Even assuming that the court of appeals erroneously allocated the burden of proof in its remand order, petitioner may still prevail on his motion to suppress at the hearing on remand, in which case the issue he raises will be moot.<sup>1</sup> On the other hand, should petitioner lose at the forthcoming hearing and his conviction be reinstated by the district court, he will be able to appeal from that determination and to petition this Court for review of this contention at that time.

In any event, the court of appeals' allocation of the burden of proof for the hearing on remand was proper. As it correctly concluded (Pet. App. A7): "Available legislative history in regard to §§2511(2)(d) and 2515

<sup>1</sup>The court of appeals held that petitioner must be granted a new trial if the tape is suppressed (Pet. App. A10).

reflects no congressional desire to change the traditional burden of proof with respect to suppression of electronically gathered evidence." It has long been settled that "[t]he burden is \* \* \* on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed." *Nardone v. United States*, 308 U.S. 338, 341.<sup>2</sup>

There is no reason to shift the burden from its customary resting place when suppression is sought under Section 2511(2)(d). The government does not have superior access to the proof necessary to show the purpose for which a private consensual interception was made. Indeed, interceptions covered by 2511(2)(d) are, by definition, made without the participation of the government. The government is consequently in no position to explain the reason for the interception. Rather, the parties to an intercepted conversation are the persons most likely to know why the interception was made. It is thus entirely appropriate to place the burden of showing the purpose of a private interception on the person seeking suppression. As a participant in the intercepted conversation, that person is familiar with the context in which the conversation occurred and is accordingly likely

<sup>2</sup>Petitioner's reliance on *Whiteley v. Warden*, 401 U.S. 560, for the proposition that the court of appeals should have reversed rather than remanded his conviction is misplaced. In *Whiteley* this Court held that the record did not establish that a magistrate had sufficient information to issue a warrant. In view of the fact that the defendant had challenged the sufficiency of the warrant at every stage of the proceeding and the State was satisfied to rely on the record, this Court declined to remand and give the State further opportunity to adduce new evidence regarding the information available to the magistrate. Here, petitioner's objection to the tape was made on the eve of trial, and the present record does not support his objection. The court of appeals has merely afforded petitioner an opportunity to carry his burden of proof with respect to that objection.

to have knowledge of the facts and circumstances necessary for the statutory showing.<sup>3</sup>

2. Petitioner's contention (Pet. 27-28) that his responses to the prosecutor's questions were not perjurious under this Court's decision in *Bronston v. United States*, 409 U.S. 352, is without merit. Unlike the situation in *Bronston*, petitioner did not offer evasive responses that were literally true although misleading by negative implication. Here the prosecutor repeatedly asked petitioner whether he had ever represented to anyone that he could use his influence to protect illicit gambling and liquor activities in northeastern Oklahoma from local law enforcement authorities. Petitioner responded unequivocally that he had not (see Pet. App. A49-A52). Petitioner's answers were both directly responsive and literally false and therefore properly punishable under 18 U.S.C. 1623.

<sup>3</sup>In a related claim, petitioner argues (Pet. 18-19) that the question whether the recording was made for one of the purposes proscribed by Section 2511(2)(d) should be determined by a jury. That question concerns the admissibility of the tape, and is thus for the court to decide. Rule 104, Fed. R. Evid. See *United States v. Whitaker*, 372 F. Supp. 154, 161 (M.D. Pa.), affirmed, 502 F. 2d 1400 (C.A. 3), certiorari denied, 419 U.S. 1113; *Steele v. United States*, 267 U.S. 505, 511.

Petitioner also urges that the making of the tape without his consent constituted a "tortious" invasion of his right of privacy and that the tape was therefore made "for the purpose of committing \* \* \* [a] tortious act" within the meaning of 18 U.S.C. 2511(2)(d). As the court of appeals noted (Pet. App. A10 n. 5), that construction would make unlawful any interception by a private party of any conversation unless all of the participants to the conversation consented to the interception—a result plainly at odds with the statute's language permitting such interceptions "where one of the parties to the communication has given prior consent" (emphasis added). Clearly, the portion of Section 2511(2)(d) that prohibits the making of consensual interceptions for specified improper purposes addresses the use to which the intercepting party plans to put the interception once it is made, rather than the making of the interception itself.

3. The record does not support petitioner's claim (Pet. 24-27) that his false testimony was not material to the grand jury's investigation. The grand jury was investigating a possible conspiracy between organized crime figures in Kansas City and nightclub owners to establish illicit gambling, liquor, and prostitution activities in northeastern Oklahoma. During the course of its inquiry, the grand jury received testimony from various witnesses concerning petitioner's representation that he could "control" district attorney Grayson, testimony that indicated petitioner might be the link between the conspiracy and the public officials whose corruption was necessary to the success of the scheme. Thus, as the court of appeals correctly observed (Pet. App. A14), "the grand jury had to know the truth about \* \* \* Phillips' statements that he could control Grayson," and "[b]y testifying that he could not put a fix on Grayson, Phillips frustrated any further fruitful investigation into legitimate matters before the grand jury." Petitioner's false testimony was therefore "material" within the meaning of the perjury statute. See *United States v. Lasater*, 535 F. 2d 1041, 1047 (C.A. 8); *United States v. Saenz*, 511 F. 2d 766, 768 (C.A. 5).<sup>4</sup>

<sup>4</sup>Petitioner also suggests (Pet. 24-27) that the grand jury did not have "jurisdiction" to ask the questions to which he responded falsely because those questions dealt solely with his activities in the Northern District of Oklahoma, rather than the Western District of Missouri, where the grand jury was sitting. But it is settled that a grand jury investigating a conspiracy may inquire into conduct of conspirators that may have occurred elsewhere. *Brown v. United States*, 245 F. 2d 549, 554 (C.A. 8). In any event, 18 U.S.C. 1623, unlike other statutes punishing false statements (e.g., 18 U.S.C. 1001), does not require the government to prove "jurisdiction" as an element of the crime, and it is no defense to a perjury charge that the government had no authority to ask the questions to which false answers were given. *United States v. Mandujano*, No. 74-754, decided May 19, 1976, plurality slip op. 12; *Bryson v. United States*, 396 U.S. 64, 72.

# CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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